SUPREME COURT, U. S.

Supreme Court of the United States

No. 387

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

PHILIP J. KHURI,

Petitioner

v.

UNITED STATES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Petitioner, Philip J. Khuri, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in the above entitled cause.

OPINION BELOW

The opinion of the Court of Claims (R. 117; Appendix A, *infra*, 1A) is unreported.

JURISDICTION

The judgment of the Court of Claims was dated and entered on June 7, 1961. (R. 117, 124; Appendix A, *infra*, 1A, 9A). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1255.

STATUTES

See Appendix B, *infra*, at page 10A.

REGULATIONS

See Appendix B, *infra*, at page 10A.

QUESTIONS PRESENTED

1. Whether petitioner, a nonresident alien and a citizen of Lebanon, employed in the Office of the Consul General, American Embassy, at Beirut, for approximately 35 years is entitled to the procedural rights contained in Regulations I Foreign Service Manual IV, § 918.8, which were promulgated by the Secretary of State for the administration of foreign employees.

2. If petitioner were entitled to the procedural rights under said Regulations:

(a) Whether petitioner's right under § 918.83b to be informed of the charges against him prior to his discharge for cause on December 20, 1956 was satisfied when a panel investigating visa irregularities called petitioner before them on December 18, 1956 and orally charged him of participating in such visa irregularities, and the Secretary of State approved the action of the panel.

(b) Whether petitioner's right to a formal hearing at the post under § 918.83e was satisfied when he was informed orally of the charges against him as stated in (a) *supra*, when said panel read certain statements to him made by informants which implicated him in such visa irregularities, when petitioner demanded the names of such informants and the right to confront and to cross examine them, and when said panel refused to divulge the names of such informants on the ground that they might be murdered and that their future usefulness as informants would be destroyed, and the Secretary of State approved the action of the panel.

3. Whether the Court of Claims should have granted petitioner's motion for summary judgment.

STATEMENT OF THE CASE

Petitioner is an alien nonresident of the United States, a citizen of Lebanon, who was employed in the Office of the Consul General, American Embassy, at Beirut, Lebanon, for approximately 35 years prior to his discharge on December 20, 1956. (R. 177; Appendix A, *infra*, 1A.)

In 1956 petitioner was the Chief Visa Clerk in the Visa Office of the Consul General at Beirut. He was the senior foreign employee. As Chief Visa Clerk his duties consisted of maintaining the visa quota registration lists which determined the relative priority of applicants for immigration visas to the United States, registering new applicants for immigration visas by date of application and country of birth, maintaining the reports which revealed the current status of people registered in the worldwide quota lists, and drafting correspondence pertaining to individual visa applicants. (R. 117-118; Appendix A, *infra*, 1A.)

During an investigation begun in 1956 to determine the nature of visa fraud rings suspected to exist, the petitioner and three other employees on December 18, 1956, were called separately before a panel of four appointed by the American Ambassador to Lebanon to make such investigation. Prior to his appearance before the panel, petitioner had not received any oral or written charges that he was under suspicion. (R. 118; Appendix A, B, *infra*, 2A, 14A.) Petitioner was before the panel for approximately 45 minutes during which time he was informed orally of the nature of the investigation and his suspected implication; the panel questioned him regarding alleged evidence in their possession implicating him in visa irregularities; and the panel read statements to petitioner made by informants implicating him and asked him

for an explanation. Petitioner denied all of the charges and demanded the right to confront his accusers and to cross examine them. The panel refused to divulge their name for fear that they might be murdered and that their future usefulness as informants would be destroyed. (R. 118; Appendix A, *infra,* 2A.)

Petitioner appeared before the panel again on December 19, 1956 and again denied all charges and demanded the right to confront his accusers. (R. 118; Appendix A, *infra,* 2A.)

On December 20, 1956, petitioner was discharged by the American Ambassador for cause (R. 118, 119; Appendix A, *infra,* 3A, 15A), and the Secretary of State approved the Ambassador's action. (R. 118, 119; Appendix A, *infra,* 3A.) No security issue is involved. (R. 114; Appendix B, *infra,* 15A.)

The local post at Lebanon had authority under I FSM IV, § 918.5 to discharge foreign employees under such Regulations as the local post might prescribe; but the local post had promulgated no such Regulations prior to petitioner's discharge on December 20, 1956. (R. 122; Appendix A, *infra,* 9A, 11A, 14A.)

Petitioner filed a motion for summary judgment in the Court of Claims and defendant filed a cross motion for summary judgment. (R. 17, 65.) The Court of Claims denied petitioner's motion, granted defendant's motion and dismissed petitioner's petition. (R. 124; Appendix A, *infra,* 1A, 9A.)

The Court of Claims held that I FSM IV, § 918.8 was merely advisory, and discretionary and intended merely as a guide to the local post in the event that the post should promulgate Regulations under I FSM IV, § 918.5; that § 918.8 had not been violated inasmuch as no Regulations had been promulgated under § 918.5; that in any case the oral charges given petitioner by the panel on December

18, 1956 satisfied the requirement of § 918.83b of the right to be informed of the charges against him; and that petitioner's appearance before the panel on that date satisfied the requirement of § 918.83c of the right to a formal hearing at the post in the case of a separation for cause. (R. 122, 123; Appendix A, *infra*, 7A, 8A.)

The Court of Claims has jurisdiction under Title 28, Secs. 1491 (3), (4) and 2502, U. S. C.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Claims in holding that I FSM IV, § 918.8 (R. 121; Appendix B, *infra*, 7A) is merely advisory, and discretionary and intended merely as a guide to the local post only in the event that the local post promulgates Regulations under the delegated authority of I FSM IV, § 918.5 (R. 119; Appendix B, *infra*, 7A); and that the Secretary of State did not fail to follow his own Regulations in view of the fact that the local post did not promulgate any Regulations under such delegated authority is in conflict with the decisions of this Court in *U. S.* v. *Shaughnessy* (1954), 347 U. S. 260, 98 L. Ed. 681, 74 S. Ct. 499; *Service* v. *Dulles* (1957), 354 U. S. 361, 372, 1 L. Ed. 2d 1403, 1410, 77 S. Ct. 1152; *Vitarelli* v. *Seaton* (1959), 359 U. S. 535, 538, 3 L. Ed 2d 1012, 1016, 79 S. Ct. 968. (Rule 191(b), 2.)

In these cases this Court held that even though the Secretary may have unlimited statutory authority to discharge an employee for any specified grounds without charges and without a hearing thereon, still the Secretary is bound to follow any Regulations he has promulgated for dealing with cases falling within the Regulations. Clearly I FSM IV, § 918.8 is for the benefit of foreign employees and not a Regulation which the local post may disregard at will. Petitioner's case falls strictly within the Regulation. The effect of the decision of the Court of Claims is that by merely failing to promulgate a Regu-

lation under the delegated authority of § 918.5, the local post can deprive a foreign employee of the procedural rights provided for his benefit under § 918.8. Such a holding is in conflict with the above cited decisions of this Court.

2. The decision of the Court of Claims is in conflict with the decision of this Court in *Green* v. *McElroy* (1959), 360 U. S. 474, 496, 3 L. Ed. 1377, 1390. In the opinion written by the Chief Justice this Court stated:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual and the reasonableness of the act depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual, so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of testimony of individuals, whose memory might be faulty, or who in fact might be perjurers, or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross examination. They have ancient roots."
>
> (Rule 191(b), 2.)

The Court of Claims held that the oral charges given to petitioner for the first time during his 45-minute appearance before the panel and the questioning of him by the panel and the reading of statements made by undisclosed informants implicating him in alleged visa irregularities and denying him the right to confront his accusers and to cross examine them was a formal hearing within the meaning of 1 FSM IV, § 918.8.

3. The Court of Claims has departed from the accepted and usual course of judicial proceedings in sanctioning as a formal hearing a unilateral proceeding in which petitioner never was given any charges prior to his appear-

ance for approximately 45 minutes before a panel appointed by the Ambassador to investigate alleged irregular visa practices, at which time he was told orally that he was under suspicion, questioned, asked for explanations of charges made against him by undisclosed informants, and upon his demand denied the right to confront and to cross examine them. The decision of the Court of Claims is in conflict with the decisions of this Court cited in paragraphs 1 and 2, *supra*, and this Court should exercise its power of supervision. (Rule 19 1(b), 2.)

CONCLUSION

For the reasons stated petitioner prays that a writ of Certiorari may be granted.

Respectfully submitted.

Walter E. Barton
Investment Building
Washington 5, D. C.

Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 480-59

(Decided June 7, 1961)

PHILIP J. KHURI v. THE UNITED STATES

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

LARAMORE, *Judge*, delivered the opinion of the court:

Plaintiff, a nonresident alien and a citizen of Lebanon, employed by the Foreign Service in the visa office of the American Embassy, Beirut, was discharged on the basis of his participation in visa frauds. He seeks back pay from December 20, 1956, based on the alleged denial of the separation procedures alleged to be required by section 918.8 of the Foreign Service Manual.

The facts are briefly as follows: Plaintiff was employed in 1956 as Chief Visa Clerk in the visa office of the American Consulate, Beirut, Lebanon. He was the senior local employee in the office, having approximately 35 years of service. As Chief Visa Clerk plaintiff maintained the visa quota registration lists which determine the relative priority of a prospective immigrant for an immigration visa to enter the United States under the quota system. Maintenance consisted of registering new applicants by date of application and country of birth, and no entry could have been made or deleted in this book without plaintiff's knowledge and initial. Plaintiff also maintained quota files which contained all relevant documents presented by the applicant. In addition, plaintiff

alone maintained the reports that revealed the current status of people registered in the world-wide quota lists. Plaintiff also drafted correspondence concerning individual visa applicants.

As a result of an investigation begun in 1956 to determine the nature of visa fraud rings suspected to exist, plaintiff was called before a panel appointed by Ambassador Heath, consisting of Mr. Frederick A. Bohne, Consul, Mr. Enoch Lachinian, Mr. Harold Pfau, Personnel Officer, and Mr. Robert B. Allen, Vice Consul.

Plaintiff, along with three other employees, was separately questioned regarding evidence implicating them in visa irregularities. Each man was informed of the nature of the investigation and of his suspected implication. Each was told of the reason for his appearance and given the opportunity to make an explanation.

Plaintiff was questioned by the panel for approximately 45 minutes. Statements made by informants and witnesses were read to him, without identifying their authors. The reason for not identifying the authors of the statements was a fear that they would be murdered because of their testimony and for the further reason that it was thought that disclosure would destroy their future usefulness as informants.

At the conclusion of the questioning plaintiff was told not to discuss the matter with other employees who had appeared before the panel and was told that he would have an opportunity to make an additional statement to the panel the next day. At no time was he told he could not confer with the panel members. The following day plaintiff again appeared before the panel but offered nothing further except to deny the charges and insist on confrontation of his accusers.

Based on the evidence developed by the investigation, it was agreed by all members of the panel that sufficient evidence existed involving three employees, including plaintiff, and as a consequence they were each dismissed. Plaintiff's dismissal took place on December 20, 1956, the day following the second appearance before the panel. Said dismissal was pursuant to 1 FSM IV, section 918.5, which provided:

> 918.5 *Separation for Cause*
>
> Local employees may be separated for malfeasance, misconduct, or for unsatisfactory performance of their duties under such rules as the Foreign Service post may prescribe. The policy of the Department and of the Foreign Service is to protect its employees against arbitrary separation for reasons not related to the good of the Service. Employees are required, however, to render honest, efficient, and loyal service, and shall be separated or removed when necessary to maintain the required discipline and efficiency of the Service.

Plaintiff appealed his dismissal to the American Ambassador who referred his file to the State Department in Washington for an independent determination. The State Department affirmed the dismissal. Thereafter plaintiff appealed his dismissal to the Foreign Service Inspector who made an independent determination and concluded that the evidence warranted plaintiff's dismissal.

It is plaintiff's position that he was entitled to be informed of the charges against him and the right to a hearing thereon prior to his dismissal, under the Foreign Service Manual. He contends that he was not informed of the charges and was not given a hearing thereon and consequently his dismissal was illegal.

Defendant on the other hand contends that the Secretary of State had authority to discharge plaintiff sum-

marily; that Congress had authorized the Secretary of State to administer the personnel of the Foreign Service and authorized him to delegate such authority under section 811a, 22 U.S.C. (1952 Ed.), 63 Stat. 111, which provides:

> § 811a. *Administration of Foreign Service; delegation of authority.*
>
> The Secretary of State, or such person or persons designated by him, notwithstanding the provisions of this chapter or any other law, * * * shall administer, coordinate, and direct the Foreign Service of the United States and the personnel of the State Department. * * *.

Defendant then contends that the Secretary of State delegated to the individual Foreign Service posts authority to separate alien employees for malfeasance and misconduct coextensive to that conferred upon the Secretary by Congress. Defendant further contends that plaintiff actually was in fact afforded the privileges recommended in subsection 918.83 to the maximum extent the circumstances permitted.

There can be no doubt that Congress authorized the Secretary of State to administer and direct the Foreign Service of the United States and the personnel of the State Department. 22 U.S.C. 811a, *supra*. There also can be no doubt that the Secretary of State under section 811a, *supra*, had the power to delegate such authority. Nor can there be any doubt that the Secretary had not only the authority but the duty to separate from the Service any alien clerk or employee found guilty of misconduct or malfeasance under 22 U.S.C. 1028, which provides:

> § 1028. *Separation for misconduct or malfeasance.*
>
> The Secretary shall separate from the Service any alien clerk or employee who shall be found guilty of misconduct or malfeasance.

In respect to the above Act Congress has not prescribed any procedures to effect such separation. Thus, obviously such procedures are left to the discretion of the Secretary. As a matter of fact, other provisions of the Foreign Service Act give the Secretary complete control over matters of hiring of employees, transfer of employees, classification and fixing of salaries. 22 U.S.C. §§ 946, 947, 872, 886, 889.

Section 1026 of title 22 authorizes the Secretary to promote alien employees with complete discretion as to the reasons therefor.

Section 1027 of title 22 authorizes the Secretary to separate alien employees for unsatisfactory performance of duties.

The Foreign Service Act of 1946, 63 Stat. 111, *supra*, removed Foreign Service personnel from the coverage of Civil Service legislation and placed them under the direct control of the Secretary of State who was authorized to promulgate all rules relating to their employment.

In view of the foregoing, it is clear that plaintiff, an alien clerk, had no statutory right to a hearing or to any other specific separation procedure. The only question then is whether the Secretary's regulations provided a mandate for notice and hearing prior to separation.

The action taken by the agency is clearly shown by the record. Plaintiff's security classification was withdrawn on November 8, 1956 because of his participation in visa irregularities. After a hearing he was discharged for cause under 1 FSM IV, section 918.5, effective December 20, 1956.

It is noted that section 918.5 provides for separation under such rules "as the Foreign Service post may prescribe," and further provides that "Employees * * * shall be separated or removed when necessary * * *."

Plaintiff contends, however, that section 918.8 was applicable under a section 918.5 discharge and that defendant did not comply with his interpretation of the procedures required therein. Section 918.8 provides:

> 918.8 *Fair Process Rule in Separation of Local Employees*
>
> 918.81 Foreign Service posts, in exercising their authority to make rules relating to separation, should attempt to make procedural rules consistent with the principles of procedural justice in the local area. Good personnel practice and the need to gain favorable publicity for the Foreign Service as an employer demand that the maximum procedural fairness be followed in separating local employees.
>
> 918.82 Despite the necessity for fairness and conformance with local custom, a post should never permit agencies outside the Foreign Service to play any part in the separation process, and it should be understood as one of the terms of employment that no local or other outside authority has local jurisdiction over the employment conditions affecting local employees of the post, as well as the fact that local laws and regulations relating to employment, social security, or other phases of labor protection do not govern the United States Foreign Service employment system. This does not, however, affect the general policy of the Foreign Service to adhere, as closely as pertinent United States laws and regulations will allow, to local laws, customs, and practices with respect to employment conditions and prevailing wages in the locality in which each post is located; nor does it relieve Foreign Service posts from their moral responsibility to refrain from arbitrary action, whenever possible, in the interests of the Government and the Foreign Service.
>
> 918.83 Good procedural practice in administration of the separation process should give the employee who is to be separated the following privileges:
>
> a. The right to participate in the process in a language intelligible to the employee.

b. The right to be informed of the charges against him or the reasons for his separation, except in cases in which adverse security information is the cause.

c. The right to receive notice of shortcomings prior to separation and to have an opportunity to overcome such shortcomings.

d. The right to appeal to some person other than the one who brings the charges.

e. A formal hearing at the post in the case of separation for cause, if the employee so desires. For use as a guide, see 1 FSM IV 700 which outlines the procedures for separation of American employees of the Foreign Service.

A study of section 918.8, *supra*, leads us to the conclusion that not only this section, but all sections of the regulations promulgated by the Secretary of State were merely intended as a guide and to set forth general policies and principles in the event Foreign Service posts did promulgate regulations. For instance, subsection 918.81 calls attention to the fact that in exercising authority to make rules relating to separation, the post should attempt to make procedural rules consistent with the principles of procedural justice in the local area. This clearly is a direction to the Foreign Service post and not a regulation that plaintiff could rely on. Again in subsection 918.82 the language clearly shows that the precise rules to be used are left to the individual Foreign Service post. Again in subsection 918.83 the Secretary did not use mandatory language, but consistent with the language of the two prior sections uses the permissive or advisory language "should give."

We can find no specific direction in section 918.8, *supra*, that regulations must be promulgated, and quite clearly the American Ambassador to Lebanon did not issue regulations in spite of the fact that such authority was vested in him. Hence it cannot be said that there was a failure to follow his own regulations as required by the Supreme

Court's decision in *Service* v. *Dulles,* 354 U.S. 363, or that a mandate was contained in the Secretary's regulation that plaintiff be granted some procedures before removal. Subsection 918.83, *supra,* suggests good procedural practice and suggests that before removal employees be given the right to participate in a language intelligible to the employee (plaintiff spoke good English); the right to be informed of the charges and reasons for separation; the right to appeal; and the right to a formal hearing at the post. This regulation contained no directive that notice of charges be in writing and plaintiff was actually orally informed of the charges against him and orally given reasons for separation. Furthermore, he was given a formal hearing and did appeal. So in any event plaintiff was in fact afforded the privileges recommended in subsection 918.83 to the maximum extent the circumstances permitted. This, it seems to the court, was really more than plaintiff was actually entitled to since section 918.8 did not give plaintiff any enforceable rights.

If the Secretary's regulations were meant to be anything other than advisory as to a discretion lodged in the Foreign Service post, there would be no purpose in the Secretary's issuance of separate regulations pertaining to aliens. Aliens could be grouped with the regulations dealing with separation of Americans, which regulations are specific and leave no discretion to the Foreign Service posts.

We can see nothing startling or unique in our conclusion in that each Foreign Service post certainly would have a diversity of problems which could only be adequately coped with by giving the individual post unrestricted authority. This could only be consistent with the best interests of the United States.

Furthermore, if the plaintiff were guilty of the irregularities charged against him, it could very well affect the security of the United States. Selling visas or tampering

with records which might permit an enemy alien to enter the United States as an immigrant could, in our opinion, create a serious threat to our national security. Subsection 918.83b., *supra*, quite clearly removes any right to be informed of charges or reasons for separation in cases in which adverse security information is the cause.

It was the belief of those responsible for the removal or retention that plaintiff was guilty of the acts with which he was charged, and in the light of the above conclusions plaintiff's separation was clearly indicated.

For the reasons stated above, plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted, and the petition will be dismissed.

It is so ordered.

DURFEE, *Judge;* MADDEN, *Judge;* WHITAKER, *Judge;* and JONES, *Chief Judge*, concur.

APPENDIX B

(STATUTES)

Sec. 151c. *Rules and regulations; promulgation by Secretary; delegation of Authority.*

The Secretary of State may promulgate such rules and regulations as may be necessary to carry out the functions now or hereafter vested in the Secretary of State or the Department of State, and he may delegate authority to perform any of such functions to officers and employees under his direction and supervision. (Title 5, § 151c, U. S. C.; Act of May 26, 1949, c. 143, § 4, 63 Stat. 111.)

Sec. 1027. *Separation for unsatisfactory performance of duty.*

The Secretary may, under such regulations as he may prescribe separate from the Service any alien clerk or employee on account of the unsatisfactory performance of his duties. (Title 22, § 1027, U. S. C.; Act of Aug. 13, 1946, c. 957, Title VI, § 662, 60 Stat. 1017.)

Sec. 1028. *Separation for misconduct or malfeasance.*

The Secretary shall separate from the Service any alien clerk or employee who shall be found guilty of misconduct or malfeasance. (Title 22, § 1028, U. S. C.; Act of Aug. 13, 1946, c. 957, Title VI, § 663, 60 Stat. 1017.)

(REGULATIONS)

(1 FSM Part IV)

910 *LOCAL EMPLOYEE PERSONNEL ADMINISTRATION*

911 *Introduction*

911.1 *Definition of "Local Employees"*

The term "Foreign Service local employees" or "local employees" refers to personnel em-

ployed at Foreign Service posts who are not citizens of the United States (exclusive of consular agents). "Local employees" is used instead of the term "alien employees" contained in the Foreign Service Act of 1946.

911.2 *Scope*

This subchapter of the Foreign Service Manual consolidates the major portion of regulations and procedures covering the administration of local employees. Where certain regulations and procedures pertaining to local employees are the same as those governing other Foreign Service personnel, cross references are made to other portions of the manual which contain such common regulations. The *Foreign Service Handbook on Local Wage Surveys and Salary Schedules* supplements 1 FSM IV 913.

911.3 *Authority of Foreign Service Posts*

911.31 Each Foreign Service post is authorized to effect all personnel actions on local employees, subject to the policies, regulations, and procedures of this subchapter, other relevant sections of the Foreign Service Manual and the *Handbook on Local Wage Surveys and Salary Schedules.*

* * * *

918.5 *Separation for Cause*

Local employees may be separated for malfeasance, misconduct, or for unsatisfactory performance of their duties under such rules as the Foreign Service post may prescribe. The policy of the Department and of the Foreign Service is to protect its employees against arbitrary separation for reasons not related to the good of the Service. Employees are required, however, to render honest, efficient, and loyal service, and shall be separated or removed when necessary to maintain the required discipline and efficiency of the Service.

918.6 *Separation Due to Ineligibility for Continued Employment*

* * * *

918.62 *Separation for Reasons Arising Out of the Security and Suitability Investigation*

A local employee shall be separated if the final results of the suitability and security investigation are adverse and recommendation for separation has been made to the regional security headquarters. The specific reasons shall not be given to the employee in such cases.

918.63 *Separation on Grounds of Security*

When the continued employment of a local employee presents a security threat to the United States, the post shall separate such employee with or without the usual notice, depending on the degree of security risk involved. The reasons shall not be given to the employee in such cases.

918.8 *Fair Process Rule in Separation of Local Employees*

918.81 Foreign Service posts, in exercising their authority to make rules relating to separation, should attempt to make procedural rules consistent with the principles of procedural justice in the local area. Good personnel practice and the need to gain favorable publicity for the Foreign Service as an employer demand that the maximum procedural fairness be followed in separating local employees.

918.82 Despite the necessity for fairness and conformance with local custom, a post should never permit agencies outside the Foreign Service to play any part

in the separation process, and it should be understood as one of the terms of employment that no local or other outside authority has local jurisdiction over the employment conditions affecting local employees of the post, as well as the fact that local laws and regulations relating to employment, social security, or other phases of labor protection do not govern the United States Foreign Service employment system. This does not, however, affect the general policy of the Foreign Service to adhere, as closely as pertinent United States laws and regulations will allow, to local laws, customs, and practices with respect to employment conditions and prevailing wages in the locality in which each post is located; nor does it relieve Foreign Service posts from their moral responsibility to refrain from arbitrary action, whenever possible, in the interests of the Government and the Foreign Service.

918.83 Good procedural practice in administration of the separation process should give the employee who is to be separated the following priviliges:

a. The right to participate in the process in a language intelligible to the employee.

b. The right to be informed of the charges against him or the reasons for his separation, except in cases in which adverse security information is the cause.

c. The right to receive notice of shortcomings prior to separation and to have an opportunity to overcome such shortcomings.

d. The right to appeal to some person other than the one who brings the charges.

e. A formal hearing at the post in the case of separation for cause, if the employee so desires. For use as a guide, see 1 FSM IV 700 which outlines the procedures for separation of American employees of the Foreign Service.

(PARTIAL STIPULATION OF FACTS)

3. Plaintiff was discharged on December 20, 1956. A copy of the Embassy letter of December 20, 1956 to plaintiff, containing notification of this action, is attached hereto as Exhibit 1. No written charges of misconduct were given to plaintiff prior to this letter.

5. No formal written rules governing the separation of local employees had been promulgated by the Foreign Service Post in Beirut, Lebanon at the time of plaintiff's discharge.

STIPULATION EXHIBIT 1.

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

(U. S. SEAL) AMERICAN EMBASSY

December 20, 1956

Mr. Phillip Khouri,
American Consulate,
Beirut, Lebanon.

Dear Mr. Khouri:

This is to inform you that your appointment with the American Embassy will be terminated at the close of business today, December 20, 1956. This action has been taken following a careful review of the facts concerning your participation in the irregular Consular practices which have been under scrutinization for several months.

You may call at the Disbursing Office on Friday, December 21st, to collect your salary check and at that time you will be advised when your final salary and terminal leave pay will be ready.

Very truly yours,

For the Ambassador

(S) Harold W. Pfau
Personnel Officer

DEFENDANT'S SUPPLEMENTAL BRIEF)

There is no security issue involved. Plaintiff was separated for *cause* under 1 F. S. M. IV, Section 918.5 (Stipulation, Exh. 2).

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In the Supreme Court of the United States

OCTOBER TERM, 1961

PHILIP J. KHURI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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WILLIAM H. ORRICK, JR.,
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Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 387

PHILIP J. KHURI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 1A-9A) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on June 7, 1961 (Pet. 9A). The petition for a writ of certiorari was filed on September 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether petitioner's separation from employment because of participation in visa frauds violated any procedural rights given him by Department of State regulations.

REGULATION INVOLVED

The Foreign Service Manual of the Department of State (1 F.S.M. Part IV) provides in relevant part as follows:

> 918.5 *Separation for Cause*
>
> Local employees may be separated for malfeasance, misconduct, or for unsatisfactory performance of their duties under such rules as the Foreign Service post may prescribe. The policy of the Department and of the Foreign Service is to protect its employees against arbitrary separation for reasons not related to the good of the Service. Employees are required, however, to render honest, efficient, and loyal service, and shall be separated or removed when necessary to maintain the required discipline and efficiency of the Service.
>
> * * * *
>
> 918.8 *Fair Process Rule in Separation of Local Employees*
>
> 918.81 Foreign Service posts, in exercising their authority to make rules relating to separation, should attempt to make procedural rules consistent with the principles of procedural justice in the local area. Good personnel practice and the need to gain favorable publicity for the Foreign Service as an employer demand that the

maximum procedural fairness be followed in separating local employees.

918.82 Despite the necessity for fairness and conformance with local custom, a post should never permit agencies outside the Foreign Service to play any part in the separation process, and it should be understood as one of the terms of employment that no local or other outside authority has local jurisdiction over the employment conditions affecting local employees of the post, as well as the fact that local laws and regulations relating to employment, social security, or other phases of labor protection do not govern the United States Foreign Service employment system. This does not, however, affect the general policy of the Foreign Service to adhere, as closely as pertinent United States laws and regulations will allow, to local laws, customs, and practices with respect to employment conditions and prevailing wages in the locality in which each post is located; nor does it relieve Foreign Service posts from their moral responsibility to refrain from arbitrary action, whenever possible, in the interests of the Government and the Foreign Service.

918.83 Good procedural practice in administration of the separation process should give the employee who is to be separated the following privileges:

a. The right to participate in the process in a language intelligible to the employee.
b. The right to be informed of the charges against him or the reasons for his separation, except in cases in which adverse security information is the cause.

c. The right to receive notice of shortcomings prior to separation and to have an opportunity to overcome such shortcomings.
d. The right to appeal to some person other than the one who brings the charges.
e. A formal hearing at the post in the case of separation for cause, if the employee so desires. For use as a guide, see 1 FSM IV 700 which outlines the procedures for separation of American employees of the Foreign Service.

STATEMENT

Petitioner is a non-resident alien and a citizen of Lebanon who was dismissed from his employment in the visa office of the United States Embassy, Beirut, Lebanon for participation in visa frauds. The dismissal took place pursuant to § 918.5 of the Foreign Service Manual (1 F.S.M., Part IV), which provides for separation of local employees for malfeasance, misconduct, or for unsatisfactory performance of duty "under such rules as the Foreign Service post may prescribe."

The essential facts are undisputed. Petitioner was employed as chief visa clerk in the visa office of the American Consulate, Beirut, Lebanon. He was responsible for maintaining the visa quota registration lists which determine the relative priority of a prospective immigrant for an immigration visa to enter the United States under the quota system. In December 1956, as a result of an investigation into visa fraud rings suspected to exist in Beirut, petitioner

and three other employees were separately called for questioning before a panel appointed by the United States Ambassador to Lebanon. The panel consisted of the Consul, Vice Consul, Personnel Officer and Chief Investigator for Regional Security. Petitioner was informed of the nature of the investigation and of his suspected implication.[1] Statements made by informants and witnesses were read to him, although their authors were not identified because it was feared that to have done so would have resulted in their being murdered or in having their future usefulness as informants impaired. Petitioner, however, was given an opportunity to make an explanation and he was advised that on the following day he would be able to make a further statement to the panel. The session lasted for approximately forty-five minutes. The next day petitioner tendered no further explanation; however, he denied the charges and insisted on the right to confront his accusers (Pet. 1A-2A).

All of the members of the panel agreed that there was sufficient evidence to justify petitioner's dismissal and, as a consequence, on the day following his second appearance before the panel, petitioner was separated from his employment in accordance with § 918.5 of the Manual, *supra*. Petitioner appealed his dismissal to the American Ambassador who referred his file to the State Department in Washington for an independent determination. The

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[1] The procedure followed with the three other employees was essentially the same.

State Department affirmed the dismissal. Thereafter, petitioner appealed his decision to the Foreign Service Inspector who made an independent determination and concluded that the evidence warranted petitioner's dismissal (Pet. 3A).

On November 10, 1959, petitioner instituted this action in the Court of Claims to recover back pay from December 20, 1956, the date of his dismissal, claiming that his separation was invalid because he had been denied separation procedures to which he allegedly was entitled under § 918.8 of the Foreign Service Manual (Pet. 3A). The Court of Claims granted summary judgment dismissing the petition, holding that § 918.8 of the Manual did not afford petitioner the right to any separation procedures and that, even if it did, the procedures actually followed in this case were in accord with that section (Pet. 1A-9A).

ARGUMENT

Congress has directed the Secretary of State to separate from Foreign Service employment local employees—*i.e.*, personnel employed at Foreign Service posts who are not citizens of the United States (1 FSM Part IV, § 911)—who are guilty of misconduct or malfeasance. 22 U.S.C. 1028. Unlike Foreign Service officers, however, who are entitled to a hearing before the Foreign Service Board, 22 U.S.C. 1007 and 1008, Congress did not require a particular procedure to be followed in separating local employees but left that procedure to the discretion of the Secretary of State. The issue that is here presented is

whether the Secretary of State has by regulation created legally enforceable procedural rights for the benefit of local employees with which the Department did not comply in dismissing petitioner from employment. The Court of Claims held that such rights had not been created by the section of the Manual relied upon (§ 918.8) and that, in any event, the procedure followed comported with the language of that section. That decision is clearly correct and is in no way inconsistent or in conflict with decisions of this Court. Review is not warranted.

1. Petitioner was dismissed from employment pursuant to § 918.5 of the Foreign Service Manual promulgated by the Secretary of State[2] to govern local employee personnel administration. That section delegates to local Foreign Service posts[3] authority to separate local employees who are guilty of misconduct or malfeasance "under such rules as the Foreign Service post may prescribe." Petitioner asserts that superimposed upon this delegation of authority are mandatory procedural rights prescribed in § 918.8 by the Secretary of State for the benefit of local employees.

Section 918.8 is not, however, for the benefit of the local alien employee; on the contrary, it is hortatory in nature, confirms that separation procedures

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[2] The Secretary's regulatory authority is based upon 5 U.S.C. 151(c) and 22 U.S.C. 1027.

[3] Under 22 U.S.C. 811(a) the Secretary of State is to administer the Foreign Service and for that purpose he is authorized to delegate authority.

are to be locally evolved, and is merely advisory to the Foreign Service posts, with emphasis placed upon paramount interest of the Government and the Foreign Service. Thus § 918.81 calls for fairness of separation procedures not because it is a right of the employee but because of "[g]ood personnel practice and the need to gain favorable publicity for the Foreign Service as an employer." The Foreign Service post has a "moral" obligation to refrain from arbitrary action but only "whenever possible, in the interests of the Government and the Foreign Service" (§ 918.82). The employee is not accorded "rights" but the local post is advised that it "should attempt" to make fair procedural rules "consistent with the principles of procedural justice in the local area" (§ 918.81). The permissive and advisory character of that section makes it an unsubstantial basis for petitioner's claim of procedural irregularities in his separation.[4]

2. Moreover, petitioner had the benefit of the "good procedural practice" recommended by the Secretary in § 918.83. He was informed of the charges against

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[4] The decision below plainly does not, as claimed (Pet. 5), conflict with decisions of this Court. *Service* v. *Dulles*, 354 U.S. 363, 372 and *Vitarelli* v. *Seaton*, 359 U.S. 535, 538 (Pet. 5), held that the removing authority in personnel actions is bound by the procedures set forth in applicable regulations. As we have shown, however, petitioner here was granted no procedural rights and the separation procedure followed was, moreover, in accord with the advisory regulation upon which he relies. *United States* v. *Shaughnessy*, 347 U.S. 260, is patently inapposite to the question presented by this case.

him (§ 918.83(c)), and given an opportunity to make an explanation at a hearing (§ 918.83(c)) in which he participated in a language intelligible to him (§ 918.83(a)).[5] Additionally, he was allowed an appeal to persons other than the ones who conducted the hearing (§ 918.83(d)).

Petitioner asserts, however, that the hearing afforded him was defective because he did not have an opportunity to confront and cross-examine the informants and witnesses who made statements adverse to him (Pet. 6). The Secretary's regulations, however, do not provide for confrontation and cross-examination. *Greene* v. *McElroy*, 360 U.S. 474, 496, cited by petitioner in support of his claim (Pet. 6), is not in point. That case held only that the Department of Defense industrial security regulations were not authorized by statute. No claim is made here of a lack of statutory authorization,[6] and the

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[5] Section 918.83(c) recommends a "formal hearing" but does not specify its elements. Although it suggests as a "guide" the procedures followed with respect to separation of American employees (§ 700), that is in no sense mandatory. If it were, as the Court of Claims noted, there would be no necessity for two sets of regulations, one for alien employees and another for Americans.

[6] 22 U.S.C. 1027 and 1028 govern the dismissal of alien employees. Section 1027 provides generally that the "Secretary may, under such regulations as he may prescribe, separate from the Service any alien clerk or employee on account of the unsatisfactory performance of his duties," while § 1028 specifically directs that the Secretary "shall" separate any alien employee guilty of misconduct. That those provisions leave to the Secretary's discretion the procedures to be followed in dismissing alien employees is

Greene case has no bearing on petitioner's claim that he has been denied a right given him by the regulations.

Finally, the decision not to allow petitioner to confront and cross-examine the government's informants and witnesses was not arbitrary. In the judgment of the responsible officials to have permitted confrontation might have led to the murder of the witness or the impairment of the usefulness of the government's informants.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1961

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emphasized by the contrast between them and the provisions governing Foreign Service officers, which, although otherwise similar, qualify the Secretary's discretion in such cases by adding: "but no such officer shall be so separated from the Service until he shall have been granted a hearing by the Board of the Foreign Service * * * " (22 U.S.C. 1007(a) and 1008(a)).

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